

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA, )  
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 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 GELEAN MARK, )  
 VERNON FAGAN, ) Criminal No. 2006-80  
 WALTER ELLS, )  
 DORIAN SWAN, )  
 KELVIN MOSES, )  
 HENRY FREEMAN, and )  
 EVERETTE MILLS, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

**ATTORNEYS:**

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St. Thomas, U.S.V.I.  
*For the plaintiff,*

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*For defendant Gelean Mark,*

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St. Thomas, U.S.V.I.  
*For defendant Vernon Fagan,*

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*For defendant Walter Ells,*

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St. Thomas, U.S.V.I.  
*For defendant Dorian Swan,*

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St. Thomas, U.S.V.I.  
*For defendant Kelvin Moses,*

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New York, NY  
*For defendant Henry Freeman,*

**Arturo R. Watlington, Jr., Esq.**

St. Thomas, U.S.V.I.  
*For defendant Everette Mills.*

#### **MEMORANDUM OPINION**

**GÓMEZ, C.J.**

Before the Court are the motions of defendants Gelean Mark ("Mark"), Henry Freeman ("Freeman"), Dorian Swan ("Swan"), and Kelvin Moses ("Moses") (the "defendants") to suppress their pre-trial identifications.<sup>1</sup> A hearing on the matter was held on August 22, 2007.

#### **I. FACTS**

In November, 2004, Drug Enforcement Administration ("DEA") Agent Michael Goldfinger and Detective Mark Joseph, of the Virgin

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<sup>1</sup> Vernon Fagan ("Fagan"), Walter Ells ("Ells"), and Everette Mills ("Mills") are also defendants in this matter. However, Fagan, Ells, and Mills failed to timely move to suppress any pretrial identifications.

Islands Police Department<sup>2</sup> began investigating the alleged drug trafficking activity that is the subject of the indictment in this matter. Between early 2005, through August, 2007, law enforcement officers interviewed approximately nine individuals who potentially had information regarding the drug trafficking organization. During these interviews, several of the witnesses identified the defendants based on photographs shown to them by the agents.

**A. Mark**

The first identification of Mark was made by a confidential witness, at a neutral location in a DEA vehicle, in early 2005. Agent Goldfinger and DEA Special Agent Kevin Adams, who had arranged the interview, conducted the interview. At the suppression hearing, Agent Goldfinger described the identification procedure he ordinarily used (the "ordinary procedure), which was also employed in this first interview:

A: At the beginning of the interview, before any questions were asked of the witness, these photographs were handed to the witness. The witness -

PROSECUTOR: And how were they handed?

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<sup>2</sup> Detective Joseph is a federally deputized Task Force agent with the DEA.

A: In a stack. In a stack of pictures.

The interviewee was asked . . . to look through all the pictures. If you recognize someone . . . pull that picture aside.

. . . .

After the interviewee was able to identify certain individuals and locations out of the overall stack of photos, those photos were put aside. We then went through each photo individually with the interviewee to find out their knowledge to find out their knowledge of that particular person, if they knew their name, and what their association was with that individual

(*Id.* at 6, 7.)

The second identification of Mark resulted from an interview of a potential witness conducted by Agent Goldfinger and DEA Special Agent Jeff Vincent in spring, 2005. Special Agent Vincent had communicated with the witness prior to the interview, and had shown the photograph from Mark's North Carolina driver's license to the witness.<sup>3</sup> The interview took place at a federal correctional institution in the Southeastern United States. The witness was incarcerated at the time. The agents handed the individual an array consisting of eight photographs. As Agent Goldfinger explained at the suppression hearing:

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<sup>3</sup> Agent Goldfinger explained at the suppression hearing that all identifying information was redacted from the license. The witness was shown only the photograph.

A: For this particular interview, the photo array was arranged because the individual which we wanted identified we were certain prior to the interview had contact and been involved prior with his person.

So we wanted to create a photo array specifically so we could be certain that he [identified] the one person we needed him to [identify].

. . .

PROSECUTOR: And, when [the witness was] given that photo array, what if anything occurred?

A: When the witness was shown the photo array, he identified the individual, which we expected him to identify.

Q: And what else happened after the [array] was shown to the witness?

A: We then . . . handed the witness another series of multiple photographs showing places [and] people who we also thought they would be involved with as far as this organization.

(Suppression Hr'g Tr. 11-12, Aug. 22, 2007.) The witness again identified Mark in older and more recent individual photographs as well as in group pictures from the second series of photos shown to him by the law enforcement officers. After making the positive identifications, the witness signed his initials on each photograph he had identified as Mark.

Agent Goldfinger obtained a second identification of Mark in 2005, pursuant to an interview with a potential witness at an

attorney's office in North Carolina. After being shown a series of photographs pursuant to the ordinary procedure, the witness identified Mark in two individual photographs (one older and one more recent), one photograph of Mark posing with four other people, and one photograph of Mark posing with six other people.

The third identification of Mark occurred during an interview of a witness at the DEA office in Raleigh, North Carolina. The interview was conducted by Agent Goldfinger, along with Detective Joseph, and DEA Task Force Agent Kyle York. The agents used the ordinary identification procedure, and the witness positively identified Mark in a photograph with a group of other people.

The fourth identification of Mark was obtained pursuant to an interview of a potential witness conducted at an attorney's office in Charlotte, North Carolina. Agent Goldfinger and Detective Joseph conducted the interview, and the witness' attorney was also present. In this interview, the witness was shown a series of around fifty photographs on a computer screen, approximately two inches by one and a half inches in size. The witness positively identified Mark. Thereafter, Agent Goldfinger noted which images had been identified and included that

information in a written report. There is no physical copy of these images.

The fifth and sixth identifications occurred on August 16, 2007, at a prison in Alamance County, North Carolina pursuant to interviews with two different prisoners. Agent Goldfinger and Task Force Agent Mark Thomas conducted the interviews, which had been arranged by ICE in North Carolina. At the suppression hearing, Agent Goldfinger explained that these witnesses were shown:

an eight by ten piece of paper which contained a series of [approximately 15] photographs of various members of this organization.

. . . .

They were like passport sized photos.

(*Id.* at 113-14.)

**B. Swan**

The first identification of Swan was obtained pursuant to an interview conducted at a federal penitentiary in the Southeastern United States. Agent Goldfinger used the ordinary procedure for the identification, and the witness positively identified Swan from the series of photographs he was given.

The second identification of Swan occurred during an interview conducted by Agent Goldfinger at an attorney's office in North Carolina. The witness' attorney was also present during the interview. The witness positively identified Swan pursuant to the ordinary procedure.

Additionally, Agent Goldfinger obtained a third identification of Swan during an interview conducted on August 16, 2007. In that interview, the witness was shown a piece of paper, eight by ten inches in size, containing approximately fifteen passport-sized photographs of different people allegedly involved in this matter. The witness positively identified Swan from amongst the images.

**C. Moses**

The only identification of Moses was obtained on August 31, 2006. Detective Joseph, Agent Goldfinger, and Special Agent James Bryant interviewed the witness at a DEA office in Greensboro, North Carolina. The witness positively identified Moses out of a series of at least twenty photographs, according to the ordinary procedure.

**D. Freeman**

The first identification of Freeman occurred on May 3, 2006, at a neutral location, in the back of a DEA vehicle.<sup>4</sup> At the suppression hearing, Agent Goldfinger described the interview:

When this individual entered our vehicle, myself and [a] Task Force Agent showed this individual a photo of Freeman and the individual said that's Butchie.

. . .

I believe I said to him, do you know who this person is? And he said yes, that's Butchie.

(*Id.* at 225-26.)

At the suppression hearing, Agent Goldfinger also described the second identification of Freeman, which occurred on August 9, 2006:

I met the confidential source at a predetermined location. The confidential source got in the vehicle. I showed him a photo of Mr. Freeman, asked him, do you know who this person is. He stated that's Butchie. And that's essentially Kirwin's right hand man.

(*Id.* at 224-25.)

Agent Goldfinger obtained the third identification of Freeman during an interview with Elton Turnbull, a witness who

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<sup>4</sup> Though the record reveals at least one prior identification of Freeman, he does not challenge it.

has testified for the government in an allegedly related matter. The interview took place at the federal prison in Guaynabo, Puerto Rico, where Turnbull was incarcerated. Agent Goldfinger showed Turnbull the same single photograph of Freeman. Turnbull positively identified the person in the photograph as Butchie.

Agent Goldfinger also conducted three interviews with different individuals at the DEA office in Raleigh, North Carolina. All three interviews resulted in positive identifications of Freeman after the witnesses were shown a series of at least 25 different photographs of different people.

On August 16, 2007, Agent Goldfinger obtained a seventh identification of Freeman. The interview took place at a prison in Alamance County, where the witness was incarcerated. The witness was shown an eight by ten piece of paper containing approximately fifteen passport-sized photographs of different individuals. The witness identified one of the people in the photographs as Butchie and Freeman.

The defendants now move to suppress the pre-trial identifications, pursuant to the Sixth Amendment to the United States Constitution, and the Due Process Clause of the Fifth and Fourteenth Amendments.

## II. DISCUSSION

### A. **The Sixth Amendment Right to Counsel**

The Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” U.S. CONST. amend. VI. This guarantee to counsel includes the right to counsel during certain pre-trial identification procedures. *See United States v. Wade*, 388 U.S. 218, 224 (1967). The Sixth Amendment right to counsel attaches at critical stages of criminal prosecution, after adversarial proceedings have been initiated against the defendant. *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (explaining that the Sixth Amendment right to counsel attaches when adversarial proceedings have been initiated, for example, at arraignment).

### B. **Due Process under the Fifth and Fourteenth Amendments**

The Fifth Amendment provides that, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. A defendant may challenge an identification as a violation of his due process rights if the identification procedure used was highly suggestive, leading to an unreliable identification. *See Neil v. Biggers*, 409 U.S. 188,

198 (1972) ("It is the likelihood of misidentification with violated the defendant's right to due process. . . .").

### III. ANALYSIS

#### A. **Right to Counsel During Pretrial Identification**

Freeman argues that the officers violated his Sixth Amendment right to counsel by conducting any of the interviews that resulted in pretrial identifications after he was indicted and without his counsel present. It is true that the Sixth Amendment guarantees the right to counsel after formal legal proceedings have been initiated against a criminal defendant. *Brewer*, 430 U.S. at 401. However, a defendant has no right to counsel during an identification made pursuant to photographs. See *United States v. Ash*, 413 U.S. 300, 321 (1973); *Gov't of the V.I. v. Benjamin*, 736 F. Supp. 1337, 1348 (D.V.I. 1990). Here, all of the post-indictment identifications of Freeman were made by witnesses looking at photographs. Accordingly, Freeman's reliance on the Sixth Amendment is misplaced. The Court will not suppress the pretrial identification on these grounds.

**B. Admission of Pretrial Identification as Due Process Violation**

Mark, Freeman, Swan and Moses all argue that the pretrial identifications should be excluded as violative of their due process rights because they resulted from unnecessarily suggestive procedures, which irreparably tainted the reliability of the identification.

Courts apply a two-stage test to determine whether a pretrial identification should be excluded because it violates the defendant's due process rights. *See United States v. Stevens*, 935 F.2d 1380, 1389 (3d Cir. 1991). First, the Court must determine whether the identification procedure was unnecessarily or impermissibly suggestive. *Id.* Second, even if the procedure was unnecessarily suggestive, the Court must determine whether the pretrial identification was nonetheless reliable. *Id.*

The burden of proving that an identification procedure was unnecessarily suggestive rests with the defendant. *See United States v. Lawrence*, 349 F.3d 109, 115 (3d Cir. 2003).

"[S]howing a witness a photographic array can constitute a denial of due process when police attempt to emphasize the photograph of

a given suspect, or when the circumstances surrounding the array unduly suggest who an identifying witness should select."

*Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 383, 88 S. Ct. 967, 19 L. Ed.2d 1247 (1968)). The court must look to the totality of the circumstances in evaluating the suggestiveness of a photographic identification. *Id.*

#### **1. Reproduction of Photographic Identifications**

As a threshold matter, the Court notes that the government was unable to reproduce at the suppression hearing all of the photographs shown to the witnesses during the interviews. With respect to the identifications made pursuant to the ordinary procedure, the law enforcement officers kept only the photographs from the series that had been positively identified by the witnesses. Additionally, the images shown to the witness on the computer screen at the attorney's office in North Carolina were never printed. Finally, the government was unable to produce the eight by ten inch papers used in the identifications of Mark on August 16, 2007, by the date of the suppression hearing.

However, the fact that all of the photographs shown to the witnesses could not be reproduced at the suppression hearing does not mean that the identifications are unconstitutional. *See,*

*e.g., Featherstone v. Estelle*, 948 F.2d 1497 (9th Cir. 1991) (holding that the defendant's due process rights were not violated when the state destroyed a photographic lineup, from which the victim had identified the defendant). Indeed, the defendants still bear the burden of proving that the identifications at issue were unnecessarily suggestive. *See id;* *see also Lawrence*, 349 F.3d at 115.

## **2. Multiple-Photograph Identifications**

Mark, Swan, Moses, and Freeman have all been identified by witnesses who were shown multiple photographs of different individuals at the time of the identification. With respect to these multiple photograph identifications, none of the defendants have shown that the law enforcement officers emphasized that defendant's photograph more than any other individual in the series.

Regarding the suggestibility of the circumstances surrounding the identifications, some of the witnesses who identified the defendants had spoken with agents about the investigation prior to making the identifications. There is also evidence that, on at least one occasion, a witness had been shown a photograph of a defendant prior to the interview in which he

made the identification. Finally, the record reveals that some of the photographs may have been taken at the time the defendants were arrested. However, the defendants have presented no evidence that the agents communicated any information about the defendants to the witnesses with the purpose or effect of influencing their identification. There is also nothing in the record to suggest that any of the photographs of any of the defendants unfairly suggested that such defendant was involved in criminal activity.

Furthermore, Agent Goldfinger stated at the suppression hearing that the witnesses were familiar with the drug trafficking organization before they were interviewed. Agent Goldfinger testified at the suppression hearing that:

The witnesses, depending on their involvement with the organization had knowledge of involvement with the members of the organization ranging from 1999 to 2006.

(Suppression Hr'g Tr. 13, Aug. 22, 2007.) Additionally, Agent Goldfinger described the atmosphere of the interviews as:

a relaxed, non-confrontational setting. All interviewees had been advised that, you know, they're free to talk to us.

. . . .

And all interviewees went through with the interview without hesitation.

(*Id.*)

Under these circumstances, the defendants have failed to meet their burden of showing that the procedure in which witnesses chose the defendants' photographs out of a stack of photographs was unnecessarily suggestive. *See, e.g., United States v. Mathis*, 264 F.3d 321, 331-32 (3d Cir. 2001) (holding that the fact that a police officer/eyewitness who identified the defendant after viewing an array of eight photographs, had seen one photograph from the array one month earlier as part of collection of materials describing various bank robbery suspects, did not render array unnecessarily suggestive); *United States v. Dunbar*, 767 F.2d 72, 75 (3d Cir. 1985) (holding that the district court did not abuse its discretion in admitting into evidence a "mugshot" of the defendant because, *inter alia*, the photograph contained nothing identifying it as a police photo); *Gregory-Bey v. Hanks*, 332 F.3d 1036 (7th Cir. 2003) (holding that the fact that officer told the witness before she viewed photo array that another witness had positively identified a suspect from stack of 24 photos did not render photo array unduly suggestive).

### **3. Single-Photograph Identifications**

The agents also obtained three identifications of Freeman after showing witnesses a single photograph of Freeman. There is nothing in the record to indicate that there was any exigency to warrant this abbreviated procedure. Under these circumstances, the Court finds that the single-photograph identification procedure was unnecessarily suggestive. *See, e.g., Manson v. Brathwaite*, 432 U.S. 98, 115 (1977) (holding that the identification procedure was unnecessarily suggestive since the witness was shown only one photograph and there was no exigency).

Though the pretrial identifications of Freeman in which only one photograph was shown to the witnesses were unnecessarily suggestive, they should not be suppressed if the totality of the circumstances show that they were nonetheless reliable. *See Stevens*, 935 F.2d at 1389.

The five factors considered in determining reliability are: (1) the witness' opportunity to view the defendant at the time of the crime; (2) the witness' degree of attention at the time of the crime; (3) the accuracy of the witness' description of the defendant prior to the identification, (4) the witness' level of certainty when identifying the defendant; and (5) the length of time elapsed between the crime and the identification. *See*

*Biggers*, 409 U.S. at 199; see also *United States v. Emmanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995).<sup>5</sup>

Here, all of the witnesses who positively identified Freeman pursuant to a single photograph referred to him by his nickname, "Butchie." Additionally, none of the witnesses hesitated or waived when they made the identifications. However, there is no evidence in the record to suggest that any of the witnesses have ever had an opportunity to view Freeman prior to the interviews that resulted in the identifications. The record is similarly devoid of any prior description given by the witnesses of Freeman's appearance. Under these circumstances, the Court finds that the pretrial identifications of Freeman made pursuant to single-photograph displays are unreliable.

#### IV. CONCLUSION

For the reasons described above, the Court will deny the motions of Mark, Swan, and Moses to suppress the pretrial identifications in their entirety. With respect to Freeman, the Court will deny the motion to suppress the pretrial

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<sup>5</sup> The Court notes that there is a Circuit split as to whether courts should consider the strength of other evidence against the defendant in determining the identification's reliability. The Third Circuit has ascribed to the minority position that does not consider such evidence in the reliability calculus. See, e.g., *Emmanuele*, 51 F.3d at 1128.

identifications made pursuant to procedures in which witnesses were shown multiple photographs. The Court will grant Freeman's motion to suppress the pretrial identifications made after the witnesses were shown only one photograph. An appropriate order follows.

**Dated: September 5, 2007**

S\\_\_\_\_\_  
**CURTIS V. GÓMEZ**  
**Chief Judge**

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